

Committee of Experts  
on International Cooperation in Tax Matters  
11<sup>th</sup> Session: Geneva, 19-23 October 2015

Agenda Item 3 (a) (ii):  
Article 5 (Permanent establishment):  
the meaning of “connected projects”

**- Viktoria Wöhrer -**

# Minority view – physical presence

Article 5(3)(b) refers to furnishing of services, including consultancy services, by an enterprise through employees or other personnel. Some Committee members noted, however, that the development of the digital economy might create challenges for the application of that provision. The growth of the digital economy had resulted in enterprises of a Contracting State furnishing services in the other Contracting State with a limited physical presence or without any physical presence in that other State. They further noted that enterprises might now centrally manage many functions that previously required local presence, and expressed concerns about the effects of these changes on the allocation of taxing rights between the source country and the residence country. A minority view was that the requirement of physical presence is no longer relevant for Article 5(3)(b) as the business cycle may be completed without that physical presence. While some of those concerns may be addressed by adopting the Article on Fees for Technical Services, such an Article does not cover all services covered under Article 5(3)(b).

## 12.3. [...] Factors that may be especially relevant for that purpose include whether:

- the projects are covered by a single master contract;
- ~~the projects would have been covered by a single contract in absence of tax planning considerations;~~ the projects would usually be covered by a single contract;
- the contracts covering the different projects were concluded with the same person or related persons;
- the conclusion of additional contracts with a person is a logical consequence of a previous contract concluded with that person or related persons;
- the nature of the services provided under the different projects is the same or similar;
- the same employees are performing the services under the different projects;

Changes are proposed in order to avoid subjective elements

## 12.3. [...] Factors that may be especially relevant for that purpose include whether: [cont'd]

- [the projects are provided at the same location;](#)
- [the services are provided consecutively;](#)
- [the projects resulted from the same bidding and/or negotiation;](#)
- [each project is incapable of separate delivery or acceptance;](#)
- [a reasonable business person would not have entered into the contract as a separate project.](#)

Purpose of proposed changes:

Factors already included are similar to the ones listed in OECD Commentary on Art. 5 para. 42.41 / BEPS Action 7 – Splitting-up of contracts

Factors focus on the enterprise performing the service

However: also perspective of the customer is relevant

## 12.5 The 183-day threshold – closely related enterprises

- 12.5. The 183-day threshold provided for in Article 5(3)(b) may give rise to abuses. It has indeed been found that some enterprises seek to make what is in reality a single project, or connected projects, appear to be distinct projects, especially through the use of separate contracts and ~~associated~~ [closely related](#) companies. Those apparently distinct projects cover periods of less than 183 days each and are partly attributed to one or more ~~associated~~ [closely related](#) companies. Domestic legislative or judicial anti-avoidance rules may apply to prevent such abuses. This issue may, however, also be dealt with in Article 5 of the treaty through a specific provision, which could be drafted along the following lines:

## 12.5 The 183-day threshold – closely related enterprises [cont'd]

*“For the purposes of determining whether the period of more than 183 days in any 12-month period referred to in subparagraph 3(b) has been met:*

- a) where an enterprise performs services in a Contracting State during periods of time that do not last more than 183 days, and*
- b) one or more enterprises closely related to the first-mentioned enterprise ~~associated enterprises~~ perform services in that State for the same or a connected project through employees or other personnel who, during that period, are present and performing such services in that State, during different periods of time*

*these different periods of time shall be added to the period of time during which the first-mentioned enterprise has performed services in that State.*

## 12.5 The 183-day threshold – closely related enterprises [cont'd]

*For the purpose of the preceding sentence, an enterprise is closely related to an enterprise if, based on all the relevant facts and circumstances, shall be associated with another enterprise if one has control of the other is controlled directly or indirectly by the other, or both are under the control of controlled directly or indirectly by the same person(s) or enterprise(s).—regardless of whether or not these persons are residents of one of the Contracting States. In any case, a person shall be considered to be closely related to an enterprise if one possesses directly or indirectly more than 50 per cent of the beneficial interest in the other (or, in the case of a company, more than 50 per cent of the aggregate vote and value of the company's shares or of the beneficial equity interest in the company) or if another person possesses directly or indirectly more than 50 per cent of the beneficial interest (or in the case of a company, more than 50 per cent of the aggregate vote and value of the company's shares or of the beneficial equity in the company) in the person and the enterprise.”*

Same definition as under BEPS Action 7

## 12.7 The 183-day threshold – closely related enterprises [cont'd]

12.7. Article 5(3)(b) addresses the situation of an *enterprise* that performs services in a Contracting State through employees or other personnel. The 183-day threshold referred to in subparagraph b) therefore applies to the enterprise and not to the different employees or other personnel through whom the activities are performed. A day will count towards the 183-day threshold if, during that day, the enterprise performs its activities through at least one of its employees or other personnel ~~or – if the anti-abuse provision~~



## 12.X Employees kept available for a client

12.X An enterprise that agrees to keep employees or other personnel available for a client who needs their services and charges the client for making such personnel available, the period which the employees or other personnel are available to the client and present in the source country will count towards the 183-day threshold irrespective of the fact that they are idle during the days when they remain available.

Should be included as a separate paragraph after 12.7